

Therefore, evidence of the above-listed convictions may be elicited by the defendant during Ms. Montgomery's testimony should she testify at trial.

3. The admissibility of evidence regarding other crimes, wrongs, or acts is governed by Rule 404(b) of the New Hampshire Rules of Criminal Procedure. Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

4. Rule 404(b) prohibits the use of such evidence as so-called "propensity" evidence; however, evidence of other crimes, wrongs, or acts may be admissible if 1) the evidence is relevant for a purpose other than proving the actor's character or disposition; 2) there is clear proof that the other acts occurred and that the person in question committed them; and 3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *State v. Lamprey*, 149 N.H. 364, 369-70 (2003). Kayla Montgomery's once pending charges for receiving stolen property and theft by deception, listed in subparagraphs 1.d. and 1.e. of the defendant's motion, were a part of her negotiated plea and were conditionally not pressed pursuant to the sentencing memorandum and agreement of the parties. As part of that agreement that these charges may be brought again should she not testify truthfully at trial, they qualify for admission under this Rule as the defendant seeks their admission for purposes other than proving character or disposition, the State agrees that there is clear proof the acts occurred, and the probative value is not outweighed by the danger of unfair prejudice since the sentencing memorandum and agreement between the State and Ms. Montgomery's counsel will likely be submitted as its own substantive exhibit. Therefore, evidence of the above-listed charges and

agreement that they not be prosecuted unless she testifies to something other than the truth may be elicited by the defendant during Ms. Montgomery's testimony should she testify at trial.

5. Other than alleging that Ms. Montgomery was "dealing/possession of prescription drugs" in paragraphs 1 and 10.c. of his motion, the defendant fails to explain what he means by this or how it would be admissible. Without this, the State is left to theorize his reasons to seek its admission, and in doing so, must imagine he seeks its admission for the same reason the defendant's drug use is admissible as it is intrinsic other acts evidence that is not subject to Rule 404(b). *See State v. Wells*, 166 N.H. 73, 77–78 (2014).

6. Generally, evidence of other crimes would have to be admitted under Rule 404(b); however, the NH Supreme Court held in *Papillion* that evidence which is intrinsic to the case at hand is not 404(b) evidence. *State v. Papillion*, 173 N.H. 13, 24-25 (2020). When the evidence of the other act and the evidence of the crime charged are "inextricably intertwined" or part of the same "criminal episode" there is a causal connection with the charged crime and the uncharged offenses. *Id.* Such evidence which is a prelude to the charged offense is directly probative, arises from the same events, forms an integral part of a witness' testimony or completes the story of the charged offense. *Id.* The Court in *Papillion*, cited to *Wells* where it had previously found that other act evidence could be intrinsic to a case under the rationale that "events do not occur in a vacuum and the jury has a right to hear what occurred immediately prior to and subsequent to the commission of the charged act" in order to conduct a realistic evaluation of the evidence. *State v. Wells*, 166 N.H. 73, 78 (2014).

7. For intrinsic evidence to be admissible, the trial court would follow the Rule 403 balancing test. *See State v. Nightingale*, 160 N.H. 569 (2010) and *State v. Dion*, 164 N.H. 544 (2013). Under Rule 403, evidence may be excluded if the probative value is substantially

outweighed by unfair prejudice, confusion of the issues, is misleading to the jury, presents cumulative evidence, causes undue delay, or wastes time. The Court in *Ainsworth* advised that evidence would be unfairly prejudicial where its primary purpose was to appeal to sympathy or cause the jury to base its decision on something other than the evidence in the case. *State v. Ainsworth*, 151 N.H. 691 (2005).

8. The New Hampshire Supreme Court has made a distinction between two types of other crimes, wrongs, or acts: intrinsic and extrinsic. *State v. Wells*, 166 N.H. 73, 77–78 (2014). “Other act evidence is intrinsic, and therefore not subject to Rule 404(b), when the evidence of the other act and the evidence of the crime charged are inextricably intertwined” *Id.* at 77 (internal quotations omitted). “Typically, [intrinsic other act evidence] is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness’s testimony, or completes the story of the charged offense.” *Id.* at 77–78

9. Specifically in the case at bar, the State theorizes in the defendant’s vacuum that his reasons to seek Ms. Montgomery’s drug use at and around the time of the defendant’s actions are the same reasons why the defendant’s drug use is admissible, as it is intrinsic other acts evidence that is not subject to Rule 404(b). The State anticipates that witnesses will testify that the defendant was using illegal drugs prior to and following Harmony’s murder. It anticipates that Ms. Montgomery will testify that the defendant used heroin for twenty to twenty-five minutes while Harmony slowly died in the back seat of his car, and that both adults were using drugs in the days before and after the defendant murdered his daughter. It is expected that she will also testify that on the day he beat his daughter to death, he chose to use illegal drugs rather than checking on the five-year-old he had just struck. Other witnesses will testify that the

defendant's increasing drug use led to homelessness which lays the foundation for why the defendant and his family were living in a vehicle, and Harmony's behavior which was the likely catalyst for his decision to beat her. Just as the defendant's drug use is an integral part of the testimony of various anticipated witnesses, which completes the story of the charged offenses in the instant case, so too the defendant is likely arguing that Ms. Montgomery's drug use is intrinsic to be able to effectively conduct cross-examination on the facts at issue. Evidence of drug use here then meets the test enumerated above to show it is inextricably intertwined with the facts and circumstances of the charged offenses; therefore, such evidence would be intrinsic other acts evidence not subject to Rule 404(b). *Id.* This is then true for both the defendant and Ms. Montgomery. Therefore, evidence of Ms. Montgomery's drug use and possession as hinted at in subparagraph 1.e. of the defendant's motion without elaboration may be elicited by the defendant during Ms. Montgomery's testimony should she testify at trial.

10. The only topic the State objects to in the defendant's pleading is his final claim in subparagraph 1.g. and 15., regarding an alleged uncharged theft based upon Ms. Montgomery's prior employment at Dunkin'. Again, evidence of other crimes would have to be admitted under Rule 404(b); however, the NH Supreme Court held in *Papillion* that evidence which is intrinsic to the case at hand is not 404(b) evidence. Here, this allegation is not "intrinsically intertwined" with Kayla Montgomery's possible testimony at trial.

11. The defendant first categorizes this act as a theft, and then alleges that all thefts are "crime[s] of dishonesty." Def's Mot., ¶15. The Court knows this to be untrue as it would give no meaning to the legislature's delineation between thefts by deception, shoplifting, or misapplication. It is not by accident that the defendant's fails to cite a single source for this claim of law, and that his allegation in paragraph 15 is unsupported. Numerous federal and state

courts have held for over 45 years that simple thefts lack the requisite element of untruthfulness to be a crime of dishonesty for admission under Rule of Evidence 609(a). As was articulated succinctly in *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977):

Human experience does not justify an inference that a person will perjure himself from proof that he was guilty of petty shoplifting . . . An absence of respect for the property . . . is not an indicium of a propensity toward testimonial dishonesty. *See United States v. Ashley*, 569 F.2d 975 (5th Cir.), cert. denied, 439 U.S. 853 (1978)

12. The alleged act of theft is also not intrinsically intertwined as the defendant would like it to be since it is not part of the same “criminal episode” it lacks a causal connection with the charged offenses, it does not form an integral part of a witness’ testimony, nor does it complete the story of the charged offense. *State v. Papillion*, 173 N.H. 13, 24-25 (2020). It also fails to meet the Rule 403 balancing test to make its probative value sufficient for admissibility without creating a confusion of the issues, misleading the jury, presenting cumulative evidence, causing undue delay, or wasting time.

13. The sole basis the defendant claims for its admission is part of her perjured testimony from Grand Jury, a conviction which she will already be impeached with pursuant to Rule 609, *supra*, that she was working at Dunkin’ on November 20, 2019, when she was told by the defendant that he had taken Harmony Montgomery to her mother in Massachusetts. The substance of her perjury is that this was a lie and that Harmony was beaten to death on and around December 8, 2019, before the defendant stuffed her body in a duffle bag and brought her around Manchester before disposing of her body in March of 2020. Whether she did or did not commit a petty theft from Dunkin’ during her employment there in 2019 is not intrinsically intertwined with her testimony of what happened to Harmony Montgomery, including her initial false testimony at Grand Jury or her later disclosure of what actually occurred which led to the

discovery of corroborative testimonial and physical evidence; such as, the defendant's fingerprints and Harmony Montgomery's DNA in bodily fluids recovered from the ceiling of their later apartment in Manchester when the defendant put her body there before moving it around town. Her alleged theft does not meet the standard for admission given the facts of this case under Rule of Evidence 403, let alone Rule of Evidence 404b, and should therefore not be admissible.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) Note the State does not object to the Defendant's Motion in paragraphs 1.a through 1.e.;
- (B) Note the State does not object to the Defendant's Motion in paragraphs 1.f to the extent that the defendant and Ms. Montgomery's drug use and possession will be admissible evidence for both parties as it is intrinsic to the offenses charged and to potential cross-examination of Ms. Montgomery;
- (C) Deny the Defendant's Motion to admit alleged theft from her employer as described in paragraphs 1.g and 15.; and
- (D) Grant such further relief as may be deemed just and proper.

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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Date: January 2, 2024

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the State of New Hampshire e-filing system to Carrie Smith, Esq. and Jamie Brooks, Esq. counsel of record in this matter.

/s/ Benjamin J. Agati
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